Morton Metal Works, Inc. *and* Sheet Metal Workers' International Association, Local 24, AFL–CIO. Case 9–CA–28911

January 22, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 23, 1992, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, to amend the remedy, and to adopt the recommended Order, as modified and set forth in full below.

AMENDED REMEDY

The General Counsel excepts to the judge's failure to provide a complete reinstatement and make-whole remedy for the Respondent's unlawful refusal to recall or hire employees because of their union membership. We find merit in the General Counsel's exceptions, and shall modify the remedy and recommended Order accordingly.

Contrary to the judge's suggestion, the General Counsel was not required to request specifically a reinstatement and make-whole remedy for a violation of Section 8(a)(3). It is well established that both named and unnamed discriminatees are entitled to a reinstatement and make-whole remedy in a situation, as here, where the General Counsel has alleged and proven discrimination against a defined and easily identified class of employees. *Iron Workers Local 433 (Reynolds Electrical)*, 298 NLRB 35, 36 (1990).

Here, the complaint alleged that beginning in August 1991 the Respondent terminated the employment of, or stopped using on its various jobs, all employees who were members of the Union. In addition, at the hearing, counsel for the General Counsel stated that her intention was to leave to the compliance stage of the proceeding both the identification of the specific individuals who would be entitled to backpay and the amount of backpay to which they would be entitled. Thus, the Respondent clearly was on notice that the General Counsel was seeking a make-whole remedy for all employees who were unlawfully denied employment by the Respondent. The record shows, and the judge found, that the Respondent had an established practice of recalling directly certain employees by name, and at other times the Respondent contacted the Union and requested referral of employees through the Union's hiring hall. Accordingly, the judge has found discrimination against a defined and easily identified class of employees—those named by the judge as individuals who would have been directly recalled by the Respondent and also those as yet unidentified employees who would have been referred to the Respondent through the Union's hiring hall during the material time period. The identification of which employees are in this class is left to the compliance stage.

We shall also modify the judge's remedy and recommended Order to provide a make-whole remedy for the Respondent's violations of Section 8(a)(5).

Accordingly, having found that the Respondent has discriminated against a defined and easily identified class of employees, we shall order the Respondent to offer recall to any employees who would have been hired through the Union's hiring hall, or who would have been specifically recalled by name by the Respondent, and make whole those employees for any loss of wages and other benefits they may have suffered as a result of the Respondent's discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, because the Respondent violated Section 8(a)(5) and (1) of the Act by failing to execute the collective-bargaining agreement with the Union, and by unilaterally repudiating the agreement, we shall require the Respondent to execute the collective-bargaining agreement, to abide by its terms and conditions, and to make unit employees whole for any losses they incurred as a result of the Respondent's unlawful conduct, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The Respondent shall also make all contractually required payments to the fringe benefit funds[1] and reimburse its employees for any losses attributable to its failure to make those payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be with interest as provided in *New Horizons*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Morton Metal Works, Inc., Stoutsville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees it will go nonunion.

[1] Any additional amounts owed into the benefit funds in order to satisfy the Board's ''make-whole'' remedy shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

(b) Failing and refusing to recall or hire employees because of their union sympathies and membership.

(c) Failing and refusing to execute the successor agreement effective June 1, 1991, between the Sheet Metal Workers' International Association, Local 24, AFL–CIO and the Sheet Metal Contractors of Central Ohio.

(d) Unilaterally repudiating the terms and conditions of the successor agreement effective June 1, 1991, and its Industrial Addendum.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute, reinstate, and abide by the terms and conditions of employment of the applicable collective-bargaining agreement effective June 1, 1991, and its Industrial Addendum, including making all required fringe benefit fund payments, in the manner set forth in the amended remedy section of this decision.

(b) Make unit employees whole for any losses they incurred as a result of the Respondent's unlawful failure to execute and repudiate the collective-bargaining agreement, in the manner set forth in the amended remedy of this decision.

(c) Offer recall to former employees Mark Huddy, Bob Shorthand, Bob Hawk, Carl Huddy, Pat Donahue, Ron Copley, Jimmy Moore, David Priestly, and Huey Goeble, and similarly situated employees who would have been hired through the Union's hiring hall, or who would have been specifically recalled by the Respondent, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them, in the manner set forth in the amended remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Stoutsville, Ohio facility and all its jobsites in Ohio, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees we are going to go nonunion.

WE WILL NOT fail to hire or recall employees because of their union sympathies and membership.

WE WILL NOT repudiate our collective-bargaining agreement with the Sheet Metal Workers' International Association, Local 24, AFL–CIO by failing and refusing to execute the successor agreement effective June 1, 1991, between the Union and Sheet Metal Contractors of Central Ohio and the new Industrial Addendum or by failing and refusing to follow its terms and conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL execute, reinstate, and abide by the terms and conditions of employment of the applicable collective-bargaining agreement effective June 1, 1991, and its Industrial Addendum, including making all required fringe benefit payments.

WE WILL make unit employees whole for any losses they incurred as a result of our unlawful failure to execute and repudiate the collective-bargaining agreement.

WE WILL offer recall to former employees Mark Huddy, Bob Shorthand, Bob Hawk, Carl Huddy, Pat Donahue, Ron Copley, Jimmy Moore, David Priestly, and Huey Goeble, and similarly situated employees who would have been hired through the Union's hiring hall, or who would have been specifically recalled by

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

the Respondent, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our discrimination against them.

MORTON METAL WORKS

Deborah Jacobson, Esq., for the General Counsel.
John L. Rybolt (Blankenship & Associates), of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Columbus, Ohio, on February 18, 1992. Subsequently, briefs were filed by General Counsel and the Respondent. The proceeding is based upon a charge filed September 11, 1991,[1] as amended, by Sheet Metal Workers International Association Local 24, AFL–CIO. The Regional Director's complaint dated October 25, 1991, alleges that Respondent, Morton Metal Works, Inc., of Stoutsville, Ohio, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by telling an employee it was going nonunion, refusing to employ union members on and after August 1991, and by repudiating its collective-bargaining agreement with the Union and refusing to execute a contract it had agreed to sign.

Upon a review of the entire record[2] in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACTS

I. JURISDICTION

Respondent is engaged in performing sheet metal work and repair and maintenance services out of its Stoutsville, Ohio facility, and its primary customer is Kal Kan Foods, Inc. It admits that it annually provides services valued in excess of $50,000 for Kal Kan Foods, Inc.; and that during the past 12 months, Kal Kan Foods, Inc. sold and shipped from its Ohio facilities products valued in excess of $50,000 directly to customers located outside the State of Ohio.

Respondent, however, asserts that the Board should exercise its discretion and apply the $500,000 gross volume standard applied to retail concerns because Respondent's current participation in the service industry is the equivalent of a retail concern. It also argues that there is no showing that any labor strife would cause a substantial interruption of interstate commerce and that the effect on commerce is too De Minimus to warrant an exercise of jurisdiction.

As pointed out in the General Counsel's brief, the $500,000 standard is applicable only to *retail* enterprises, see *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959). The distinction between retail and wholesale enterprises is based on the identity of the purchaser of the employer's product or service: retail sales are only those to a purchaser of the employer's product or service: retail sales are only those to a purchaser who desires ''to satisfy his own personal wants or those of his family or friends,'' while wholesale sales constitute sales ''to trading establishments of all kinds, to institutions, industrial, commercial and professional users, and sales to government bodies.'' *Bussey-Williams Tire Co.*, 122 NLRB 1146, 1147 (1959); *Taylor Baking Co.*, 143 NLRB 566 (1963). Respondent performs most of its work for Kal Kan Foods, an industrial commercial entity, not a retail enterprise. Otherwise, there is no showing of special circumstances that would place the Respondent in some unique category that would warrant a discretionary exclusion from jurisdiction. To the contrary, the record (as discussed below), shows that Respondent previously has executed an 8(f) contract with the Union (as well as an industrial addendum), which represents, that it is a member of the construction industry (and has agreed with terms and conditions of the Union's bargaining agreement with the Sheet Metal Contractors of Central Ohio), and, under these circumstances there is no basis to refute the Board's use of the $50,000 jurisdictional standard based on the speculation that Respondent's labor affairs would be de minimus or would not affect interstate commerce.

Accordingly, I find that at all times material Respondent has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent was formed by Orville LeMaster and his wife Edith in 1990. Although she is listed as president and signs documents in this roll, she otherwise has another full-time job and Orville is the primary day-to-day manager of the business. Prior to starting his own business he was a member of the Sheet Metal Workers Union for 27 years. Respondent's primary source of work is Kal Kan for which it provides a maintenance service on machines and conveyors. It also performs some fabrication work (estimated to be valued at $30,000 a year) which would occur most often on an apparent sporadic or seasonal basis near several major holidays when the plant has scheduled annual shutdowns.

These jobs, with a crew of several workers, can last 10 to 14 days. On other occasions Respondent may be required to perform a 1-day job which would utilize the service of four to six workers.

On June 1, 1990, Respondent became signatory to a collective-bargaining agreement between Sheet Metal Workers Local 24, and the Sheet Metal Contractors of Central Ohio, an agreement that was effective until May 31, 1991. It also signed an Industrial Addendum. From time to time thereafter, Orville LeMaster contacted the Union's Business Representative David Booth to request referral of employees to a job at Kal Kan as well as other jobsites. LeMaster testified that he paid the wages and benefit contributions that were called for in that agreement, and that when a new agreement went into effect, June 1, 1991, which called for an increase in the basic wage rate for journeymen per hour (from $17.51), he began to pay the new rate. At that time Respondent also increased the contribution rates to the health and welfare and pension funds and sent remittance reports to the Union's benefit funds, indicating who worked, how many hours they worked, and how much was owed to the benefit funds.

[1] All following dates will be in 1991 unless otherwise indicated.
[2] The General Counsel's unopposed motion to correct transcript, dated April 21, 1992, is granted and received into the record as G.C. Exh. 12.

After each Kal Kan job was completed, employees would be laid off by Respondent and report back to the union hall. Sometimes Respondent would recall specific employees (four to six employees were identified by name), directly when it had its next holiday need for workers and otherwise workers would be requested from the union hall.

Mark Huddy testified that he first worked at the Kal Kan jobsite for another company whose foreman at the time was Orville LeMaster. Thereafter he was referred to Respondent for a Kal Kan assignment, on a union referral. He was given a layoff slip at the end of the jobs for Respondent, but subsequently worked several more Kal Kan so called ''shutdown'' jobs some of which were direct calls from LeMaster and some of which were union referrals.

During the course of the collective-bargaining agreement LeMaster requested a special agreement for Kal Kan and other jobsites he was bidding on. This was agreed to by the Union on February 4, 1991, in resolution 78, which, among other things, provided that at Kal Kan it could have a ratio of one journeyman to one industrial and one industrial trainee (at $7 an hour plus benefits for the first year).[3]

On or about May 1, and prior to the expiration of the then current agreement, Union Representative Booth called LeMaster to discuss negotiation for entering into a new agreement. He told LeMaster that the Union had begun negotiations with the Employer Association, and asked if LeMaster had delegated bargaining authority to the Association. LeMaster had not done so but stated that he would prefer to just sign what they signed and that he did not want to sit down and negotiate.'' Booth assured LeMaster that if he agreed to sign whatever contract was reached with the Employer Association, and to pay any increase retroactively to June 1, the Union would not pull his employees out on strike. LeMaster agreed, and Booth requested him to confirm their agreement in writing. By letter dated May 7, signed by Edith LeMaster as Respondent's president, the Respondent sent the following statement:

> RE: Contractors' Association Agreement
>
> Dear Mr. Booth:
>
> Please be advised that Morton Metal Works, Inc. agrees to abide by the Contractors' Association during negotiations. We also agree to pay retroactive wages in the event of a strike.

The Union and the Employer Association reached agreement on a new contract prior to May 31 and the Union notified all contractors of the economic terms which had been agreed upon. As noted above the Respondent began paying these increased wages and benefits on June 1, and it submitted benefit contribution reports for June.

On July 1, Booth sent LeMaster a new industrial addendum to execute and return. On some unknown date, Union President Orin Sheumaker sent LeMaster a new letter of assent to the multiemployer agreement. LeMaster did not sign either document. On or about July 8, Booth called LeMaster, told him that the Union had not yet received his letter of assent, and asked him to send it. LeMaster ''said he would. That he was looking into it.''

Meanwhile, Mark Huddy had been called directly by LeMaster to work the Kal Kan July 4th ''shutdown.'' Prior to July 13, when the job was completed in a conversation in the breakroom LeMaster indicated to Huddy and two other employees that he wasn't happy the way things were going or happy with the Union.

On July 18, Booth went to Respondent's offices. LeMaster told Booth that ''he didn't think he was going to sign it and that his ''attorney'' told him he didn't have to be signatory . . . he thought it would be better financially if he didn't.'' Thereafter, around August 1, Respondent ceased paying its employees the contractual wages and benefits. Respondent also admittedly ceased employing any union members.

Although prior to August 1, Respondent had recalled employees as needed, Respondent has since that time ceased recalling those employees who were union members. Specifically, Mark Huddy called Orville LeMaster just before Labor Day and asked if he would be called to work the expected Labor Day shutdown at Kal Kan. LeMaster said he ''wouldn't be able to use us anymore.'' When Huddy asked ''why?,'' LeMaster replied, ''well, it's sad, but I went nonunion.''

III. DISCUSSION

Mark Huddy's testimony that just before Labor Day, LeMaster told him that Respondent could not use ''us'' anymore, because he ''went nonunion,'' is uncontradicted. This statement, clearly conveys that Huddy's employment opportunities are dependent on his lack of membership in the Union and it is consistent with LeMaster's own testimony that he is not currently employing any member of the Union and has not called or recalled any union members since around the August 1, 1991.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against an employee ''in regard to hire or tenure of employment or any term or conditions of employment to encourage or discourage membership in any labor organization.'' Thus, an employer violates Section 8(a)(3) and (1) when it fails to hire, or recall employees because of their union sympathies or membership. Here, the General Counsel has presented sufficient evidence to support an inference that the employees union memberships were a motivating factor in the employer's decision not to hire or recall union employees. The record shows that Respondent has clearly and unequivocally voiced its unhappiness with the Union and it verbally had repudiated its agreement to continue as a signatory to the Employer's Association new contract, an action which is found herein to be conduct that violates Section 8(a)(5) of the Act.

Under these circumstances, I find that General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that an employee's union membership was a motivating factor in Respondent's decision regarding the hire and recall of employees.

The Respondent fails to rebut or otherwise offer any defense regarding this allegation and, under the circumstances, I find that the record shows that Respondent failed and refused to hire or recall employees because of their membership in the Union, conduct which shows that Respondent dis-

[3] The resolution also specifically referred to ''maintenance jobs in plants'' and to ''maintenance work, or chain work, or conveyor work'' indicating that this was the type of work regularly performed by union referrals and was not the type of work that would be outside the jurisdiction of the Union, as somewhat implied in Respondent's brief.

criminated in regard to the hire, tenure, terms or condition of employment of its employees, thereby discouraging membership in a labor organization, and I conclude that Respondent has been engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, as alleged.

During May 1991, when the Respondent's contract with the Union was about to expire, Respondent agreed with the Union to sign whatever contract the Union eventually reached with the Employer Association. This was confirmed in Edith LeMaster's letter of May 7, which states that Respondent ''agrees to abide by the agreement reached by the Contractors Association.''

At the hearing and on brief the Respondent's representative speculates that the signature page on the ''industrial'' or ''B'' addendum contract is a fabrication or merely a copy of the signature page on the ''contractors'' or ''A'' contract. Both signature pages are on a identical preprinted form, however, an examination of the different signature pages clearly shows some difference in the spacing of words and the shaping of some letters and I conclude that the ''B'' contract signature is not a fabrication or a mere photo copy of the ''A'' contract signature page.

Edith LeMaster testified that she signed the ''A'' contract, as well as certain other documents, but asserted that she didn't sign a ''B'' contract. She agreed that she signed more than one document when Union Representative Booth came to her house (Respondent's office) apparently on June 1, 1990. Here, I conclude that she was confused about not signing a ''B'' contract and I find that the several subsequent references to ''industrial'' work in the concessions of union resolution 78 on February 4, 1991 (G.C. Exh. 7), for and on the request of Orville LeMaster, indicate that Respondent was aware of and in fact was operating, where appropriate, under the terms of the addendum ''B'' contract.

In any event, the most significant document is the May 7, 1991 agreement to abide by the new agreement reached by the Contractors Association. Not only did Respondent sign this agreement, it thereafter paid the new wages called for and it otherwise operated under the terms of the agreement until July 18 when it suddenly announced that it would not sign any documents.

The Respondent made no timely attempt to terminate the contract when the old agreement expired May 31, but, in fact, stated that it would agree to sign the new contract negotiated by the Association and it then confirmed this intention by letter. The Respondent may not unilaterally repudiate the terms of this agreement prior to its expiration (or until its unit employees lawfully replace or change their representative, an issue not raised in this proceeding). Here the employer has voluntarily recognized the Union and a valid presumption exist that the Union, in fact, represents a majority of the employees in the unit. ''This presumption is founded on the supposition the employers normally will not knowingly violate the law.'' *Rogers I.G.A., Inc.*, 605 F.2d 1164, 1165 (10th Cir. 1979) (quoting *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 303 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979).

Under these circumstances, I find that the Respondent is bound by the terms of the new Association agreement and by its agreement to abide by its terms. As the Respondent is prohibited from unilateral repudiation of the agreement, its failure to execute the agreement tendered by the Union is a violation of Section 8(a)(5) of the Act, as alleged. Likewise, its midterm repudiation of the rights and obligations permitted by Section 8(f) under the Association's successor agreement, is a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Morton Metal Works, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent was party to the 1987–1991 agreement between the Union and Sheet Metal Contractors of Central Ohio and their industrial addendum and agreed to be bound by the successor agreement.

4. By failing and refusing to execute the successor agreement and industrial addendum and by repudiating such agreement on or about July 18, 1991, during midterm of the contract, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By telling an employee that it was ''going nonunion'' and thereafter discriminatorily failing to recall or hire that or any other union member as an employee, because of their union sympathies and membership, Respondent has violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that it be ordered to execute and abide by the terms and conditions set forth in the collective-bargaining agreement effective June 1, 1991, with Sheet Metal Workers International Association Local 24, AFL–CIO. Although no reinstatement or make-whole remedy has been specifically requested, the Respondent otherwise will be specifically ordered to offer recall to the named former employee and otherwise to hire employees in accordance with the hiring terms of the bargain agreement.

Otherwise, it is not considered to be necessary that a broad order be issued.

[Recommended Order omitted from publication.]